REMARKS

The examiner is thanked for the performance of a thorough search. Each issue raised in the Office Action mailed September 12, 2003 is addressed hereinafter.

I. STATUS OF THE CLAIMS

Claims 1, 2, 19, 20, 21, 22, and 29 have been amended. Claim 18 has been canceled. Hence, 1 – 4, 6 – 17 and 19 - 30 are pending in the application. It should be noted that Applicant has elected to amend said Claims solely for the purpose of expediting the patent application process in a manner consistent with the PTO's Patent Business Goals, 65 Fed. Reg. 54603 (9/8/00). In making this amendment, Applicant has not and does not in any way narrow the scope of protection to which Applicant considers the invention herein to be entitled and does not concede, in any way, that the subject matter of such Claims was in fact taught or disclosed by the cited prior art. Rather, Applicant reserves Applicant's right to pursue such protection at a later point in time and merely seeks to pursue protection for the subject matter presented in this submission.

II. REJECTION BASED ON 35 U.S.C. §102(e)

The Office Action has rejected Claims 1-2, 6-9, 14-16, 20-22, 24-25, and 27-30 under 35 U.S.C. 102(e) as being anticipated by Martin (U.S. Pat. No. 6,154,776).

Applicant respectfully disagrees.

In a proper rejection under § 102(e) the cited reference must show each and every claimed feature in the same combination as arranged in the claim. See Lewmar Marine,

Inc. v. Barient, Inc., 827 F.2d 744, 747-48, 3 USPQ2d 1766, 1768 (Fed. Cir. 1987). If even a single element or limitation is missing from the reference, anticipation is not found. Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1548, 220 USPQ 193, 198 (Fed. Cir. 1983).

Claim 1 has been amended to clarify the invention and includes an element of Claim 2 and the elements of Claim 18 and appears as follows:

1. A method of selectively establishing a quality of service value for a particular network device in a network that comprises a plurality of other heterogeneous network devices, comprising the steps of:

receiving application information that defines one or more traffic flows associated with one or more message types generated by an application program, including information identifying one or more points at which an application generates the traffic flows;

receiving device information that defines one of more quality of service treatments that the particular network device may apply to data processed by the particular network device;

based on the device information and the application information, determining one or more processing policies that associate the traffic flows with the quality of service treatments;

creating and storing one or more mappings of the application points to the quality of service treatments that may be used with the processing policies to generate the quality of service value when the application program generates traffic flows of one of the message types;

causing generation of the quality of service value, wherein the generation of the quality of service value is based on said one or more mappings and is performed before transmitting said traffic flows of one of the message types to said network;

enforcing one of the processing policies at the network device in response to receiving traffic from the application program that matches the traffic flow type; and

wherein enforcing one of the processing policies comprises:

requesting, using an application QoS policy element that is tightly coupled to the application program, an operating system function to modify a packet of the traffic flows using a policy element that requests a different operating system function according to the operating system then in use; and

at the network device, in response to receiving traffic from the application program that matches the traffic flow type and in response to the operating system function, modifying the packet to activate a quality of service treatment of the network device.

In particular, Martin does not disclose a system that enforces one of the processing policies at the network device in response to receiving traffic from the application program that matches the traffic flow type, wherein enforcing one of the processing policies comprises: requesting, using an application QoS policy element that is tightly coupled to the application program, an operating system function to modify a packet of the traffic flows using a policy element that requests a different operating system function according to the operating system then in use, and at the network device, in response to receiving traffic from the application program that matches the traffic flow type and in

response to the operating system function, modifying the packet to activate a quality of service treatment of the network device as claimed in the invention. As per the Office Action, Martin does not teach such a system.

Further, in relation to Claim 18's elements that have been incorporated into Claim 1, in the Office Action's Response to Arguments section, the Office Action states:

> "... Based on applicant's filing date of July 2, 1999, which applies under 35 U.S.C. 103(c) as stated above, the McCloghrie reference can be prior art ..."

This is incorrect, however. Applicant has previously pointed out that the current application is a CPA of Application Ser. No. 09/347,438 under 37 CFR § 1.53(d) and was filed on June 18, 2003. MPEP section 706.02(l)(1) states:

> "... This change to 35 U.S.C. 103 (c) applies to all utility, design and plant patent applications filed on or after November 29, 1999, including continuing applications filed under 37 CFR 1.53(b), continued prosecution application filed under 37 CFR 1.53(d), and reissues. ..."

Therefore, McCloghrie is not considered prior art.

Martin therefore does not teach every aspect of the claimed invention.

Claim 1 is therefore allowable.

Independent Claims 20, 21, 29, and 30 have been similarly amended and are similarly allowable. Claims 2, 6-9, and 14-16 are dependent upon Claim 1 and are allowable. Claims 22, 24, 25, and 27-28 are dependent upon Claim 16 and are allowable. Applicant respectfully requests that the Examiner withdraw the rejection under 35 U.S.C. 102(e).

III. REJECTION BASED ON 35 U.S.C. §103(a)

The Office Action has rejected Claims 3-4 and 23 under 35 USC §103(x) as being unpatentable over Martin in view of Chapman et al. (U.S. Pat. No. 6,028,842).

The rejection under 35 USC §103(a) is deemed moot in view of Applicant's comments regarding Claims 1, 20, 21, 29, and 30, above. Claims 3-4 and 23 are dependent upon Independent Claims 1 and 21, respectively. Therefore, Applicant respectfully requests that the Examiner withdraw the rejection under 35 USC §103(a).

IV. REJECTION BASED ON 35 U.S.C. §103(a)

The Office Action has rejected Claims 10-11, 17, 19, and 26 under 35 USC §103(a) as being unpatentable over Martin in view of Chapman et al. in further view of Mohaban et al. (U.S. Pat. No. 6,028,842).

The rejection under 35 USC §103(a) is deemed moot in view of Applicant's comments regarding Claims 1, 20, 21, 29, and 30, above. Claims 10-11, 17, and 26 are dependent upon Independent Claims 1 and 21, respectively. Claim 19 is allowable in similar

manner to Claims 1, 20, 21, 29, and 30. Therefore, Applicant respectfully requests that the Examiner withdraw the rejection under 35 USC §103(a).

V. REJECTION BASED ON 35 U.S.C. §103(a)

The Office Action has rejected Claims 12 and 13 under 35 USC §103(a) as being unpatentable over Martin in view of Schwaller et al. (U.S. Pat. No. 6,061,725).

The rejection under 35 USC §103(a) is deemed moot in view of Applicant's comments regarding Claims 1, 20, 21, 29, and 30, above. Claims 12 and 13 are dependent upon Independent Claim 1. Therefore, Applicant respectfully requests that the Examiner withdraw the rejection under 35 USC §103(a).

VI. REJECTION BASED ON 35 U.S.C. §103(c)

The Office Action has rejected Claim 18 under 35 USC §103(c) as being unpatentable over Martin in view of McCloghrie et al. (U.S. Pat. No. 6,286,052).

The rejection under 35 USC §103(c) is deemed moot in view of Applicant's canceling said Claim. However, Applicant points out that MPEP 706.02(l)(1) states:

> "The mere filing of a continuing application on or after November 29, 1999, with the required evidence of common ownership, will serve to exclude commonly owned 35 U.S.C. 102(e) prior art that was applied, or could have been applied, in a rejection under 35 U.S.C. 103 in the parent application."

The Office Action's Response to Arguments section, the Office Action states:

> "... Based on applicant's filing date of July 2, 1999, which applies under 35 U.S.C. 103(c) as stated above, the McCloghrie reference can be prior art ..."

This is incorrect, however. Applicant has previously pointed out that the current application is a CPA of Application Ser. No. 09/347,438 under 37 CFR § 1.53(d) and was filed on June 18, 2003. MPEP section 706.02(l)(1) states (emphasis added):

> "... This change to 35 U.S.C. 103 (c) applies to all utility, design and plant patent applications filed on or after November 29, 1999, including continuing applications filed under 37 CFR 1.53(b), **continued prosecution application filed under 37 CFR 1.53(d)**, and reissues. ..."

Applicant has filed a statement of common ownership with the filing of the present application. Therefore, the use of McCloghrie under 35 USC §103(c) is excluded per MPEP 706.02(l)(1). Applicant respectfully requests that the Examiner withdraw the rejection under 35 USC §103(c).

For the reasons set forth above, Applicant respectfully submits that all pending claims are patentable over the art of record, including the art cited but not applied. Accordingly, allowance of all claims is hereby respectfully solicited.

The Examiner is respectfully requested to contact the undersigned by telephone if it is believed that such contact would further the examination of the present application.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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